ORIGINAL

IN THE SUPREME COURT OF OHIO

NORTHEAST OHIO REGIONAL SEWER DISTRICT,	:	CASE NO. 2013-1770
	:	
Petitioner,	:	Appeal from Court of Appeals for the Eighth Appellate District CASE NO. CA-12-098728 (Consolidated with Case Nos. CA-12-098729 & CA-12-098739)
vs.	:	
BATH TOWNSHIP, OHIO, et al.	:	
Respondent.	:	Cuyahoga County Court of Common Pleas, CASE NO. CV-10-714945

BRIEF OF *AMICI CURIAE* COALITION OF OHIO REGIONAL DISTRICTS, DEERFIELD REGIONAL STORM WATER DISTRICT, AND ABC WATER AND STORM WATER DISTRICT IN SUPPORT OF THE APPELLANT NORTHEAST OHIO REGIONAL SEWER DISTRICT'S OMNIBUS MEMORANDUM IN RESPONSE TO AND OPPOSITION TO APPELLEES' MOTIONS FOR RECONSIDERATION AND/OR REMAND

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INTRODUCTION

For more than five years, this case has held back the Northeast Ohio Regional Sewer District (the "District") and the Amici districts from fully implementing their storm water programs and addressing significant flooding and regulatory issues. Terrible flooding was experienced throughout the District and in Mahoning County this spring and summer. The District's Stormwater Management Program (the "Program"), in limbo because of this case, could do nothing. The ABC District, created precisely to address issues in Austintown, Boardman and Canfield Townships, likewise could not help its residents. The case has also prevented other communities from utilizing R.C. Chapter 6119 to address their stormwater problems and regulatory compliance.

This Court clearly spoke in *Northeast Ohio Reg'l Sewer Dist. v. Bath Twp.*, 2015-Ohio-3705, ruling plainly that regional districts have authority to undertake storm water management programs, and to collect fees for the program, all pursuant to statutory authority in R.C. Chapter 6119. Now, just five of the fifty-six Member Communities involved in this litigation (the "Appellee Communities") and a few intervening private property owners (the "Property Owner Appellees") are ignoring the plain ruling of the Court and grasping at legal theories that have been subsumed by this Court's ruling. Reconsideration or remand to the Court of Appeals would serve only to delay much needed storm water relief, or to expose these districts to further litigation and challenges. This Court should respectfully decline the Appellee Communities and Property Owners Appellees' motions to reconsider and/or remand and permit these districts to help their residents, as intended.

Amicus curiae Coalition of Ohio Regional Districts ("CORD") is a not-for-profit association of regional water and sewer districts formed under Ohio Revised Code Chapter 6119

("6119 Districts"). Amicus curiae the Deerfield Regional Storm Water District in Warren County (the "Deerfield District") was established in 2003 under Chapter 6119 exclusively to manage storm water and to address storm water issues in Deerfield Township. Amicus curiae the ABC Water and Storm Water District in Mahoning County (the "ABC District") was established in 2009 to address both storm water and drinking water issues in the unincorporated territory of Austintown, Boardman and Canfield Townships.

ARGUMENT

This Court has spoken: the Ohio Revised Code authorizes both stormwater management and a fee to pay for it. Chapter 6119 does not dictate the methodology of the fee. A reasonable fee may be charged of anyone who uses the Program, or is serviced by the Program or benefits from the Program. R.C. 6119.09. It is illogical to suggest that a statutorily authorized fee could somehow simultaneously be an illegal tax or simultaneously be unconstitutional. Nor can Appellees claim that the authorizing statutes are unconstitutional when they have never challenged them at any level of the judiciary. After five and half long years, the Court has spoken and it is time to bring finality to this case and allow the District, and other districts, to work on the problems they were created to address.

A. Reconsideration/Remand will only cause delay and uncertainty and waste resources in the courtroom instead of fixing problems.

We all recall the torrential storms that flooded many parts of Ohio this past spring and summer. Many areas, including most of the Member Communities, found themselves with canals replacing their streets, ponds replacing their yards, debris clogging storm channels and untold property and financial damage. Austintown, Boardman and Canfield all experienced unprecedented flooding. Lives are impacted, transportation and businesses are interrupted. In

these Townships, Amici ABC District has been planning for years to implement its storm water management program and address multiple flooding and regulatory issues. For example, Boardman Township has identified approximately $6,000,000 in necessary storm water projects, including the rehabilitation of over 5,000 culverts and catch basins, some dating to the 1950s. It is impossible for the Township to keep up with the necessary repairs and properly manage the water. The ABC District was created to provide relief. It would be an injustice to tell people who are underwater that the lifeline cannot be deployed for another year or two because a few communities and property owners in another county do not like the Supreme Court's decision.

Amicus ABC District is now ready to further develop its program and move forward with a stormwater program, as so many other municipalities have done. Amicus Deerfield District has been fixing stormwater problems for the past 6 years through its program. Remand and/or reconsideration would not only give Appellees another unnecessary bite at the apple, it could also lead to further costly court battles that need not be fought.

B. Neither the Majority nor the Dissent believed that remand was appropriate because the statutory arguments subsume Appellees' other arguments.

In the Court's decision, neither the majority, the concurring opinion nor the dissent called for a remand to the Eighth District. Justice Kennedy's dissent concluded, "Because I would hold that R.C. Chapter 6119 does not authorize the type of stormwater regulation that the SMC seeks to impose and that the stormwater fee is actually an unlawful tax, I would affirm the judgment of the court of appeals and hold that the Sewer District does not have authority to implement the SMC." *Northeast Ohio Reg'l Sewer Dist. v. Bath Twp.*, 2015-Ohio-3705 at ¶68. Clearly, the dissent believed that the tax vs. fee issue was before the court as part of the arguments related to the accepted propositions of law. The dissent could have easily opined that the case should be

remanded, but it did not. The issue was before the court and not a single justice believed that remand was necessary to achieve the conclusions of their respective opinions. Most importantly, the majority clearly viewed the charges as statutorily authorized and therefore not an illegal tax.

C. Appellees' Ohio Constitutional Challenges are misplaced because member communities voluntarily agreed to join the District and give it a franchise to operate utilities within those municipalities.

With regard to Appellees' claim that municipal home rule and utility power arguments remain to be decided, such issues were likewise subsumed within the Court's opinion. Appellee cities, indeed all of the member communities within the District, are only within the District because their councils or boards of trustees adopted legislation decades ago affirmatively asking to be included within the District. Clearly, Ohio municipalities enjoy certain home-rule and utility rights under the Ohio Constitution, Article XVIII, Sections 3 and 4. However, when municipalities petition a court to include their territory within a regional district, they necessarily cede some of those municipal rights to the district. Likewise, many Ohio municipalities contract with other communities or private companies to operate a utility franchise within the municipality. Cities may not invite other entities with a franchise to manage a utility, pursuant to contract or district "charter", and later claim that the Ohio Constitution can undo the deal. The Court's decision acknowledges the statutory rights of the District within the Appellee cities and the fact that the cities invited the District.

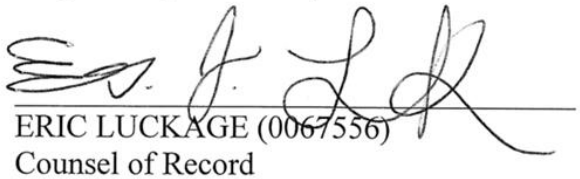
Appellees also argue that equal protection and due process issues remain unresolved. However, Appellees never challenged the constitutionality of the R.C. Chapter 6119 statutes. Remand and reconsideration are thus unnecessary.

CONCLUSION

The issues in this case were straightforward: was the District's Program authorized by R.C. Chapter 6119? If so, the Program is a water resource project and the District may collect a charge from anyone who uses the Program, or is serviced by the Program or benefits from the Program. The majority and the dissent, in their respective opinions, acknowledge this simplicity and that all other challenges are unnecessary.

For the above-stated reasons, in the interests of finality and judicial economy, *amici curiae* respectfully request that the Court deny the Appellees' motions for reconsideration and/or remand.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of October, 2015, a true copy of the foregoing amicus brief was served by regular, U.S. Mail, postage prepaid, upon the following:

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